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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments, FM Broadcast Stations)
(Anniston and Ashland, AL, College Park,)
Covington, and Milledgeville, Georgia))

FEDERAL COMMUNICATIONS COMMISSION
FCC 02-201 OFFICE OF THE SECRETARY

MM Docket No. 98-112
RM-9027
RM-9268
RM-9384

To: The Commission

REPLY TO CONSOLIDATED OPPOSITION

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Lia. ASCODE

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Preston W. Small (Mr. Small), by his attorney, hereby replies to WNNX LICO, Inc.'s (WNNX/Susquehanna) December 5, 2003, *Consolidated Opposition*. In reply thereto, the following is respectfully submitted:

A. The *Consolidated Opposition* Is Untimely Under The Rules

1) WNNX/Susquehanna's December 5, 2003 *Consolidated Opposition*, at 1, indicates that WNNX/Susquehanna is responding to Mr. Small's November 7, 2003 *Fifth Motion for Leave to Supplement the Record (Fifth Record Motion)* and the November 20, 2003 *Second Motion for Leave to File Supplement to Complaint and Request for Investigation (Second Complaint Motion)*. 47 C.F.R. § 1.45, applicable in the absence of a specific rule provision, provides that "oppositions to any motion, petition, or request may be filed within 10 days after the original pleading is filed." 47 C.F.R. § 1.4(h) provides an additional 3 days where service is by mail. WNNX/Susquehanna had until November 20, 2003 to oppose the November 7 *Fifth Record Motion* and December 3, 2003 to oppose the November 20 *Second Complaint Motion*.

2) Without explanation, without even acknowledging untimeliness, WNNX/Susquehanna filed its *Consolidated Opposition* on December 5, 2003. The *Consolidated Opposition* represents the third and fourth times that WNNX/Susquehanna has ignored the Commission's pleading deadline requirements. See January 21, 2003 *Opposition to Motion to File Response* (WNNX/Susquehanna untimely oppose *Third and Fourth Motions for Leave to File Supplement*). 47 C.F.R. § 1.429(d) authorizes parties to a proceeding to seek leave to file supplemental information. That WNNX/Susquehanna might dislike or disagree with the contents of the supplements does not excuse WNNX/Susquehanna from following the Commission's pleading rules.

3) WNNX/Susquehanna states that it "has consistently refused to be drawn into Small's speculative attempts to discredit it in this and other proceedings." *Consolidated Opposition*, ¶ 4. Nothing compels WNNX/Susquehanna to respond except its own desire to respond. While it is

WNNX/Susquehanna's option to file a response, they must follow the rules when they do respond. WNNX/Susquehanna operate on the assumption that they are not governed by the rules which govern other parties before the Commission. WNNX/Susquehanna have, on four separate occasions failed to comply with well known pleading response deadlines demonstrating a complete disregard for the Commission rules. However, Mr. Small does not object to the Commission considering the substance of WNNX/Susquehanna's *Consolidated Opposition* as that would ensure as complete a record as possible. See January 21, 2003 *Opposition to Motion to File Response*, ¶ 1

B. The *Second Complaint Motion* And The Corruption Of This Proceeding

1. The Mr. Lipp Links WNNX/Susquehanna And The Attempted Corruption

4) WNNX/Susquehanna argues that the *Second Complaint Motion* should be denied because Mr. Small "provides no rational basis whatsoever for connecting WNNX LICO with the Sessions letter or the similar letter from Senator Shelby." *Consolidated Opposition*, ¶ 5. The *Second Complaint Motion*, ¶ 2, plainly states that "the Senators' letters were clearly written from the same script and, accordingly, the same people [] are responsible for contacting both Senators in an attempt to corrupt the instant restricted proceeding and Senator Session's letter reveals a pattern of attempting to corrupt this proceeding and that Senator Shelby's letter was not an isolated, albeit egregiously improper, contact." It is undisputed that "Mr. Lipp serves as FCC counsel to each" of the FM stations discussed in the Senators' letters. *Complaint*, ¶ 7. The *Complaint*, ¶ 8, ¶ 14, argues that "we know that FM call signs do not converse with United States Senators and that a human being contacted the Senator, but the Senator's letter is silent about who made the contact," and that "because Mr. Lipp represents each of the FM licenses listed in the Senator's . . . letter, as well as WNNX/Susquehanna in the captioned proceeding, the Commission must investigate" their respective roles.

5) Mr. Small's November 10, 2003 *Reply*, ¶¶ 3-4, plainly states that the November 6, 2003 "*Response* provides only a limited denial which states that" Mr. Lipp did not directly contact Senator

Shelby's office and that

the *Response* completely, and pointedly, fails to deny that Mr. Lipp caused others to contact the Senator and fails to deny that Mr. Lipp's clients, WNNX/Susquehanna and his Alabama clients, improperly solicited the Senator. The *Response* utterly fails to discuss how it came to be that six of Mr. Lipp's represented Alabama FM stations came to contact the same congressional representative at the same time concerning the same matter. Given that "we know that FM call signs do not converse with United States Senators and that a human being contacted the Senator," *Complaint and Request for Investigation*, ¶ 8, given Mr. Lipp's unique position which enables him to comment upon his own clients' activities, given the utter failure of the opponents to deny or explain their involvement in the improper solicitation of the Senator, and even if the very narrow denial of direct contact quoted above were accepted at face value, material questions remain regarding how the Senator was brought into this proceeding and the roles played by Mr. Lipp and his clients.

6) The *Complaint* and *Reply* clearly establish that the connection between the Alabama FM stations and WNNX/Susquehanna is Mr. Lipp and that they are joined by a common interest in seeing Mr. Small lose. WNNX/Susquehanna's statement that "there is not a shred of evidence connecting WNNX LICO to a conspiracy," *Consolidated Opposition*, at 3-4 n. 3, completely ignores these uncontested facts. While WNNX/Susquehanna denies being in a conspiracy against Mr. Small, *Consolidated Opposition*, ¶ 3,¹ WNNX/Susquehanna completely fail to explain Mr. Lipp's role as the hub of the relevant parties; they do not even claim that Mr. Lipp lacks relevant information. See *Complaint and Request for Investigation*, at 4 n. 6 ("Mr. Lipp is the hub which connects the six stations listed in the Senator's letter to WNNX/Susquehanna"); *id.*, ¶¶ 7-10. There's more than "a shred of evidence," there is a plainly visible road map.²

¹ The September 3, 2002 *Petition for Reconsideration and Second Motion to Reopen the Record* shows that Thomas Gammon and Bridge Capital Investors conspired to try to obtain Mr. Small's removal from the captioned proceeding first by threat of a civil suit and then by BCI's filing of a frivolous suit against Mr. Small. The conspiracy is clear, whether WNNX/Susquehanna are party to that conspiracy must be resolved.

² WNNX/Susquehanna suggests that Mr. Small should be sanctioned for abuse of process for bringing this matter to the Commission's attention. *Consolidated Opposition*, at 4 n. 3 WNNX/Susquehanna's assertion that Mr. Small should be sanctioned is like the ocean blaming the beach for getting wet. WNNX/Susquehanna does not argue that attempting to corrupt a Commission
(continued. .)

7) WNNX/Susquehanna tries to correct the glaring omissions in its November 6 *Response* by belatedly stating that “for the record, WNNX LICO states that it had no contact, directly or indirectly, with Senator Sessions or Senator Shelby or their respective staffs; it did not solicit letters from them, and had nothing to do with the preparation or filing of either letter.” *Consolidated Response*, ¶ 6.³ WNNX/Susquehanna’s late filed response vis-a-vis the October 29, 2003 *Complaint*, even if taken at face value, completely fails to discuss or deny Susquehanna’s role, completely fails to discuss or deny Mr. Lipp’s indirect role in soliciting the senators, completely fails to discuss the fact that the *ex parte* letters were for the nominal benefit of Mr. Lipp’s Alabama clients, completely fails to address WNNX/Susquehanna/Mr. Lipp’s knowledge about what happened, completely fails to describe the circumstances which led to the introduction of the two *ex parte* letters into the captioned restricted proceeding, and completely fails to discuss who contacted the senators.

8) The subject matter of the *Complaint and Request for Investigation*, and related supplements, is not a “fantasy world,” *Consolidated Opposition*, ¶ 5, nor an “unbelievable scheme[] Small has dreamed up.” *Consolidated Opposition*, at 4 n. 3. While it might be WNNX/Susquehanna’s nightmare, Mr. Small did not “dream up” the fact that someone with an interest in the captioned restricted proceeding solicited two United States Senators for the purpose of corrupting this proceeding for the nominal benefit of Mr. Lipp’s Alabama clients. Credit for “dreaming up” this hair-brained, illegal, scheme rests elsewhere and the Commission must determine whether any person connected with the captioned proceeding played any role in “dreaming up” or

²(...continued)

proceeding is not one of decisional significance and the Commission must determine, under *Astroline*, whether it can decide this matter on the known facts or whether a hearing is necessary.

³ WNNX/Susquehanna states that it “has repeatedly and emphatically denied involvement in the various unbelievable schemes Small has dreamed up.” *Consolidated Opposition*, at 4 n. 3. That is a false statement. The *Consolidated Response* is the first time that WNNX/Susquehanna has denied that it had anything to do with the effort to corrupt this proceeding.

implementing the scheme. It is undeniable that Mr. Lipp is at the hub of this matter and it is undeniable that significant questions remain unanswered. Neither Mr. Lipp, nor any of his clients, has explained the circumstances behind the solicitation of the two *ex parte* letters and a hearing may be required to enable the Commission to collect relevant facts and to make appropriate legal conclusions. See November 10, 2003 *Reply to Response*, ¶¶ 11-12 discussing the *Astroline* test

2. WNNX/Susquehanna/Mr. Lipp and the Full Candor Requirement

9) WNNX/Susquehanna/Mr. Lipp do not deny, or even address, 1) that Mr. Lipp represents each one of the radio stations listed in each of the Senators' *ex parte* letters; 2) that Mr. Lipp has a "unique position which enables him to comment upon his own clients' activities," November 10, 2003 *Reply to Response*, ¶ 4; 3) that Mr. Lipp is the "hub" which connects the Alabama FM stations to WNNX/Susquehanna, *Complaint and Request for Investigation*, at 4 n. 6; ¶¶ 7-10; 4) that Mr. Small is entitled to an apparently fair and an objectively fair, impartial, non-politicized, restricted proceeding with comments being made openly, October 29, 2003 *Complaint and Request for Investigation*, ¶ 13; 5) that lack of candor is a disqualifying circumstance, October 29, 2003 *Complaint and Request for Investigation*, ¶ 9; November 20, 2003 *Second Complaint Motion*, ¶ 3; and 6) that attempting to corrupt a restricted proceeding through the use of political, *ex parte* pressure is disqualifying, November 3, 2003 *Motion for Leave to Supplement Complaint and Request for Investigation*, ¶ 8; November 10, 2003 *Reply to Response*, ¶ 12; November 20, 2003 *Second Complaint Motion*, ¶ 4. WNNX/Susquehanna/Mr. Lipp say nothing about Mr. Lipp's indirect role in contacting the Senators, say nothing about Susquehanna's direct and/or indirect role in contacting the senators, and say nothing about the opponents' knowledge of the circumstances surrounding the contacts made with the Senators including who made them. WNNX/Susquehanna/Mr. Lipp argue that their silence on these matters "cannot be taken as assent to his wild allegations," *Consolidated Opposition*, ¶5, and they maintain that they can stand silent in the face of extrinsic evidence that two

United Senators filed *ex parte* letters nominally on behalf of Mr. Lipp's clients.

10) WNNX/Susquehanna/Mr. Lipp's position that silence is golden in FCC proceedings utterly ignores the fact that parties are expected to be, and must be, fully candid in their dealings with the Commission. *Complaint and Request for Investigation*, ¶ 9. The Commission has long held that "an applicant's failure to come forward with a candid statement of relevant facts, whether or not such information is particularly elicited by the Commission, is a breach of the applicant's obligation to be truthful." *Wedgewood Communications Company*, 12 FCC Rcd. 18281 ¶ 10 (CSB 1997); *see also PCS 2000, L.P.*, 12 FCC Rcd. 1703 ¶ 39 (FCC 1997) ("an applicant's duty can be breached by affirmative misrepresentation and/or by a failure to come forward with a candid statement of relevant facts, whether or not such information is particularly elicited by the Commission."); *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd. 6342 ¶ 27 (Rev. Bd. 1988). *Fox Television Stations, Inc.*, 10 FCC Rcd. 8452, 8491-92 (FCC 1995) determines that

The duty of candor requires an applicant before the FCC to be "fully forthcoming as to all facts and information relevant" to its application. *Swan Creek Communications v FCC*, 39 F3d 1217, 1222 (D.C. Cir. 1994). Relevant information is defined as information that may be of "decisional significance." *RKO General*, 670 F2d at 229. The duty of candor can be breached both by affirmative misrepresentations and by a "fail[ure] to come forward with a candid statement of relevant facts," *id.*, "whether or not such information is particularly elicited" by the Commission or its staff, *Swan Creek*, 39 F.3d at 1222.

WNNX/Susquehanna/Mr. Lipp have failed their duty to provide a candid statement of relevant facts.⁴

11) Even if WNNX/Susquehanna's claim were taken at face value that WNNX did not play

⁴ Their motive for failing to be candid is clear: attempting to corrupt a restricted proceeding is a disqualifying offense and WNNX/Susquehanna/Mr. Lipp do not want to be disqualified. The Commission has determined that "intent [to deceive] is a factual question that can be inferred if other evidence shows that a motive or logical desire to deceive exists . . ." *Black Television Workshop of Los Angeles, Inc.*, 8 FCC Rcd. 4192 n. 41 (FCC 1993) citing *Calf Public Broadcasting Forum v FCC*, 752 F. 2d 670, 679 (D.C. Cir. 1985).

a role in contacting the Senators,⁵ WNNX/Susquehanna cannot escape liability if their agent, Mr. Lipp, played a role in the impermissible contacts where they are beneficiaries of those contacts. First, parties before the Commission must accept the consequences of the actions of their attorneys. *See Carol Sue Bowman*, 6 FCC Rcd. 4723 (FCC 1991) (“we have held that counsel is the applicant's agent when appearing before the Commission, and that applicants are therefore bound by counsel's action.”); *Hillebrand Broadcasting Corp.* 1 FCC Rcd. 419 n. 6 (FCC 1986) (“counsel is the applicant's agent, however, and the applicant is bound by counsel's actions.”); October 29, 2003 *Complaint and Request for Investigation*, at 3 n. 5; November 18, 2002 *Reply*, at 5 n. 4. Second, a principal cannot hide from the Commission information known to its agent where the information relates to action benefitting the principal. *Faith Center, Inc.*, 82 FCC2d 1 ¶ 65 (FCC 1980) (action of agent is attributable to the principal when the action benefits the principal even if the action is taken outside the scope of the agency); *Second Complaint Motion*, ¶ 2 (“WNNX/ Susquehanna are the substantially benefitting parties from the misconduct”).

12) WNNX/Susquehanna/Mr. Lipp's working assumption is that the Commission's rules do not apply to them. Not only have they repeatedly ignored the Commission's pleading rules, they now a claim that they are within their rights to withhold relevant information based upon an unsupported, and completely incorrect, theory that they have a right to remain silent and that their “silence cannot be taken as assent to his wild allegations.” *Consolidated Opposition*, ¶ 5. To the contrary, there is a clear duty to provide relevant information which the opponents have wilfully, and repeatedly, failed.

13) WNNX/Susquehanna/Mr. Lipp's self-imposed silence has left the Commission with no option but to draw adverse inferences against them. It is uncontradicted 1) that Mr. Lipp represents each of the FM stations listed in the Senators' letters, 2) that Mr. Lipp represents

⁵ The *Consolidate Opposition* fails to discuss Susquehanna's role in the matter.

WNNX/Susquehanna, and 3) that WNNX/Susquehanna are the substantially beneficiaries from the effort to corrupt this proceeding. In light of the opponents' failure to be forthcoming, the only rational conclusion gleaned from the known facts is that they have seriously breached the Commission's requirements, *Complaint and Request for Investigation*, ¶ 8, and disqualification is indicated. Under these circumstances the Commission must either resolve the issue adversely against WNNX/Susquehanna or designate the matter for hearing.⁶

C. The Fifth Motion For Leave To Supplement Complies With The Rules

14) WNNX/Susquehanna claim that the *Fifth Record Motion* was filed to "obstruct" the instant proceeding.⁷ *Consolidated Opposition*, ¶ 1. Mr. Small gains nothing by obstructing this proceeding and WNNX/Susquehanna fail to explain any benefit Mr. Small would gain through obstruction. The civil court in Georgia found, and the point was conceded by Mr. Small's civil adversary, that Mr. Small's goal in the captioned proceeding is to improve his radio station. *Fourth Motion for Leave to File Supplement*, Attached November 26, 2002 *Order*, at 21. While WNNX/Susquehanna claim that Mr. Small engages in "endless speculation," *Consolidated Opposition*, ¶ 3, Mr. Small's allegations are supported by documentary evidence and it is WNNX/Susquehanna which engage in unsupported speculation.

15) WNNX/Susquehanna object to Mr. Small's effort to update the record concerning the growth of Atlanta's College Park-based airport because "it hardly seems as though five *minutes* have

⁶ WNNX/Susquehanna/Mr. Lipp's claim that there is no harm because "all parties had actual notice of the letters in question," *Consolidated Opposition*, at 4 n. 3, misses the point. The real problem is not that Mr. Small received the letters after they were filed with the Commission, a clear *ex parte* violation, the real problem is that WNNX/Susquehanna/Mr. Lipp have attempted to corrupt this proceeding. That Mr. Small learned of the plan is irrelevant to the fact of the plan's existence.

⁷ A strike pleading is one "filed in bad faith for the primary purpose of blocking, impeding, or delaying the grant of an application." *Bruce D. Jacobs, Esq.*, 18 FCC Rcd. 12314 n. 8 (WTB 2003) citing *Radio Carrollton*, 69 FCC 2d 1139, 1150 ¶ 24 (1978) (subsequent history omitted).

passed since Small's last attempt to file factual information in this proceeding."⁸ *Consolidated Opposition*, ¶ 2. It is not clear what that argument means. The record in this case closed in 1998. The airport has grown substantially in the intervening five years and Mr. Small wanted to bring the Commission's attention to that fact; WNNX/Susquehanna do not argue that the airport has not grown nor that Mr. Small's facts are incorrect.

16) WNNX/Susquehanna argue that Mr. Small "could have filed information about the airport in his first, second, third, or fourth motions for leave to supplement the record." *Consolidated Opposition*, ¶ 2. WNNX/Susquehanna fail to provide any legal theory explaining, if Mr. Small could have filed the Airport information in his any earlier filed pleading, why Mr. Small is now prohibited from filing the information. WNNX/Susquehanna's argument assumes that one may seek leave to supplement the record, except that WNNX/Susquehanna feels that it should be able to draw a line at a fifth request. The rules permit a party to request leave to file supplemental information without limiting the right to four requests. *See* 47 C.F.R. § 1.429(d). This proceeding has lasted a long time and Mr. Small reasonably requested leave to update information originally presented in 1998 in order to ensure that the Commissioners had the most recently available information.

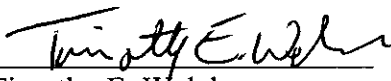
17) Finally, WNNX/Susquehanna object to Mr. Small advising the Commission that the civil suit filed against him continues. *Consolidated Opposition*, ¶ 3. WNNX/Susquehanna essentially claims that Mr. Small does not have the right to provide the Commission with periodic status reports that the illegal suit which was filed against him has not been dismissed. The threats of suit were made, and the actual suit was brought and maintained, in violation of the FCC's requirement that the civil process is not to be used to dissuade people from participating in Commission proceedings. The

⁸ WNNX/Susquehanna argues that the information about the airport is repetitive *Consolidated Opposition*, ¶ 2. However, the growth of Atlanta's airport since 1998 has not previously been brought to the Commission's attention.

Commission is properly advised, periodically, that the violation continues. WNNX/Susquehanna might not like to read about it, but that does not mean that Mr. Small cannot keep the Commission advised that the suit which was filed in violation of its abuse of process rules has not been dismissed.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of December 2003 served a copy of the foregoing *Fifth Motion for Leave to Supplement the Record* by First-Class United States mail, postage prepaid, upon the following:

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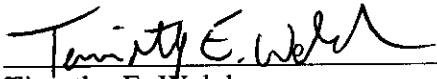
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